No. 21161

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REDERI A/B NORDSTJERNAN, etc., aka JOHNSON LINE,

Appellant,

vs.

CRESCENT WHARF & WAREHOUSE CO.,

Appellee.

Appeal From the United States District Court, Southern District of California, Central Division.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Statement of Pleadings and Jurisdictional Facts.

The Appellee agrees with and accepts as correct the Appellant's statement of pleadings and jurisdictional facts.

II.

The Jury Was Correctly Instructed to the Effect That the Shipowner's Own Fault May Preclude Recovery From the Stevedore Company.

The trial court correctly instructed the jury that if it (the jury) should find that the vessel or its cargo was in such a condition that the stevedore was prevented or seriously handicapped in its ability to discharge the vessel in a workmanlike manner and with

reasonable safety, then the shipowner is in fact precluded from recovering from the stevedore company [p. 259, line 24, to p. 260, line 4]. Although the appellant-shipowner, at page 8 of its brief, argues that "It is settled that creation of a dangerous condition by the shipowner does not preclude indemnity" such is simply not the law. An analysis of the cases clearly indicates that the law is that the creation of a dangerous condition by the shipowner, *may or may not* preclude indemnity. Whether or not it does in fact preclude indemnity is a question to be decided by the trier of fact.

The United States Supreme Court has made it clear that even in cases in which the stevedore's services have been substandard, the shipowner's own conduct may preclude its recovery from the stevedore company. *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 567, 78 S.Ct. at 441, 2 L.Ed. 2d 491. As shall be pointed out, the cases selected by the appellant in its brief were simply illustrations of situations in which the trier of fact decided that the shipowner's own fault was not sufficient, in view of the particular factual situation involved in each individual case, to preclude its recovery of indemnity from the stevedore company.

A. All Cases Cited by the Shipowner Involved Completely Different Circumstances Than Those of This Case.

In *Crumady v. Joachim Hendrik Fisser*, 358 U.S. 423, 3 L.Ed. 2d 413, 79 S.Ct. 445 (1959) the shipowner had originally created a dangerous condition by setting the cut-off for the winches in question at twice the safe working load of the booms. But the stevedore company subsequently moved the head of the boom,

and this subsequent conduct of the stevedore created a load on the booms greatly in excess of the safe working load. The condition which the ship had created was no longer even in existence at the time of the accident and accordingly played no part at all in the causation of the accident. Likewise, in *Waterman S.S. Corp. v. Dugan & McNamara,* 346 U.S. 421, 5 L.Ed. 2d 169, 81 S.Ct. 200 (1960) the ship did not create a dangerous condition but instead the stevedore itself created the dangerous condition when it discharged a portion of the stow in such a way as to leave the remainder of the stow without lateral support, thereby allowing the remainder of the stow to topple down upon the plaintiff, and, in *Matson Terminals, Inc. v. Caldwell,* 354 F.2d 681 (9th Cir. 1965), it would have been a simple matter for the stevedore company to either obtain assurance from the shipowner that the winches in question had, in fact, been repaired, or to have itself conducted a test of the said winches to determine whether the winches had been repaired; but the stevedore did neither. The situation *DeGioia v. United States Lines Co.,* 304 F.2d 421, 424 (2 Cir. 1962), was one in which the stevedore could easily have had its employees clean up the tangle of loose wire lashings, shackles, dunnage, and other objects, before commencing its stevedore operations in the area, while in *Simpson v. Royal Rotterdam Lloyd,* 255 F.Supp. 947 (S.D. N.Y. 1964), the ingots being discharged apparently could have been wiped free of grease with clean rags before they were discharged, thus eliminating the dangerous condition which caused the accident.

Similar alternatives were available to the stevedore company in each and every other case cited by appellant in its opening brief.

However, quite a different and far removed situation was present in the instant case. The 1,600 pound rolls of newsprint being discharged at the time of the plaintiff's accident were stowed, by the ship, on top of shaft alleys which were about 2½ feet above the working surface on which the longshoremen were working. Rolls of newsprint are not customarily stowed atop shaft alleys in this fashion [Rep. Tr. p. 197, lines 10-13; p. 198, lines 2-9]. The employees of the appellee-stevedore company had nothing at all to do with placing the rolls of newsprint in their aforedescribed position above the shaft alleys [Rep. Tr. p. 177, lines 5-9]. The rolls were in that location when the vessel was brought to the stevedore company by the appellant Johnson Line [Rep. Tr. p. 177, lines 12-14; p. 202, line 25, to p. 203, line 6].

There is a strong inference that the vessel's own officers not only had full knowledge of the location in which the rolls were stowed atop the shaft alleys but also that the vessel's own officers had themselves directed that the rolls be placed in that exact location. It is clear that the custom and practice of appellant Johnson Line officers, at least in the Los Angeles Harbor, is to tell loading stevedores in what particular portion of their vessels cargo is to be placed [Rep. Tr. p. 204, line 25, to p. 205, line 13].

That the stevedore ship boss originally intended the longshoremen to pull the rolls over onto the shelf or shaft alley upon which the rolls were stowed is clear. The record is equally clear that the ship boss, while he originally so intended, assumed that there was in fact room enough up on the shelf to pull the rolls over [Rep. Tr. p. 173, line 24, to p. 174, line 2]. How-

ever, the ship boss was not down in the deep tank of No. 5 hatch at any time [Rep. Tr. p. 139, lines 4-8]. His position at all relevant times was up on the main deck of the vessel [Rep. Tr. p. 139, lines 9-11]. He did not see the inshore side of the deep tank [Rep. Tr. p. 173, lines 10-13] and so was not aware of the fact that there was not room on the shelf upon which to pull the rolls over.

In order for the rolls to have been pulled over on top of the shaft alley-shelf itself, it would have been necessary for there to have been at least a five foot long clear space for the sixty inch tall rolls to fall onto [Rep. Tr. p. 174, lines 3-6], and this five foot length of clear space would have had to have been more than two feet wide either way to allow for the breadth of the roll [Rep. Tr. p. 174, lines 7-8]. In addition, the two men pulling the rolls over would need working room adjacent to the rolls being worked [Rep. Tr. p. 174, lines 16-19; p. 182, line 4, to p. 183, line 7].

The fact of the matter is that there was simply no space atop the shaft alley shelf for the men to work in pulling the rolls over on the shelf itself. A solid stow of cargo extended from the forward edge of the after-hatch opening back to the after bulkhead [Rep. Tr. p. 109, lines 13-16]. Not a single shred of evidence contradicts the testimony of the hatch boss that, shortly before the accident occurred, he did not observe any room on the starboard shelf for men to stand and work [Rep. Tr. p. 197, lines 3-6]. Accordingly, the conclusion follows that the method of discharge originally intended by the ship boss was based upon an assumption which was not consistent with the facts.

Considering the actual facts relevant to the manner in which the appellant-shipowner had caused its cargo to be stowed aboard its vessel, the method of discharge which the ship boss had in mind was in actuality not capable of being carried out. It could not have been carried out because of the condition and position of the cargo at the time the shipowner turned its vessel and cargo over to the stevedore company.

B. There Were No Practical Alternatives Available to the Stevedore Because of the Fault of the Shipowner.

The appellant more or less attempts to sell the idea that there were alternative methods of discharge available to the stevedore company at the time of the accident. The record makes such a sale impossible.

A reading of the transcript makes it apparent that there is no testimony to contradict that which is stated repeatedly and in unequivocal terms that a squeeze-clamp type of jitney could not be used because the area in which the appellant-shipowner had placed the rolls was too small to allow such a jitney to operate [Rep. Tr. p. 65, line 4, to p. 66, line 9; p. 120, lines 9-13; p. 140, lines 2-14; p. 167, lines 11-24; p. 174, line 20, to p. 175, line 19]. The record is likewise clear that a squeeze-clamp type of jitney is the customary and safest means of removing rolls of newsprint from aboard vessels. [Rep. Tr. p. 175, lines 15-19; to p. 198, line 2, to p. 199, line 7].

Although the appellant also touched briefly on the subject of the use of manual clamps, such were described by ship boss Mann as being dangerous [Rep. Tr. p. 157, line 22, to p. 158, line 10] and by hatch boss Hendrickson as being not possible to use with the

rolls in the particular position in which they were at the time of the accident, as being too heavy, and as being dangerous to the longshoremen's hands [Rep. Tr. p. 202, lines 15-24]. Likewise without contradiction is the evidence that custom and practice in Southern California regarding removal of another port's cargo is that this is only done when it is in the way of Los Angeles cargo. [Rep. Tr. p. 221, lines 3-7]. None of the evidence indicates that cargo for any other port was in the way of the rolls of newsprint.

Of paramount interest is the observation that the shipowner, upon whose shoulders rested the burden of proving its case against the stevedore company, produced not one word, nor a single witness, expert, or authority, to endeavor to show that there was any other possible method of discharging the rolls from atop the shelves. To this very moment the only direct evidence on this point was the plaintiff's testimony that from his own observation just before the accident occurred he himself did not see any way to conduct the discharge which was, under the existing conditions any, safer than the method being used by the appellee-stevedore company [Rep. Tr. p. 126, line 25, to p. 127, line 7].

The appellant-shipowner urges that a stevedore company may be under a duty to stop work rather than continue to work in the face of a known dangerous condition and that the stevedore's failure to stop work may constitute a waiver of the shipowner's own breach of contract. Without a solitary exception, each and every case relied upon by the shipowner in this connection involves a factual situation in which, by stopping its operations, the stevedore company itself could

either rectify the unsafe condition or have it corrected by the shipowner. (See *Hugev v. Dampskisaktieselskabet International*, 170 Fed. Supp. 601 (S.D. Cal. 1959), which involved a known defective hatch beam which, had the stevedore stopped work, could either have been removed, replaced by a good hatch beam, or repaired so that it would no longer be unsafe; *American President Lines, Ltd. v. Marine Terminals, Corp.*, 234 F.2d 753 (9th Cir. 1956), cert. den. 352 U.S. 926, 1 L.Ed. 2d 161, 77 S.Ct. 222, in which stevedore company knew that a safety lock was missing on a strong back but nonetheless continued work until the accident occurred although the stevedore, by stopping work, could have removed the defective strong back, could have repaired the defective strong back, or could have replaced the defective strong back with a proper strong back, or have had the shipowner undertake one of these alternatives; *Weigel v. The M/V Belgrano,* 188 Fed. Supp. 605 (D.C. Ore. 1960), in which the stevedore company was aware of the fact that the vessel's lift gear was malfunctioning but continued with its stevedoring operations, using the malfunctioning lift gear without either stopping to have the lift gear fixed, fix it itself, or use other lift gear; also see *Matson Terminals, Inc.* (*supra*) and *Nicroli* (*supra*)).

Accordingly, there is herein a complete and absolute failure by the shipowner to cite a single case under the facts of which, even if the stevedore company had stopped work in the face of a known dangerous condition, the dangerous condition could not have been cor-

rected. The reason for the shipowner's failure to cite a single case to that effect is that the law simply does not impose an obligation upon a stevedore company to stop work in the face of a dangerous condition created by the ship when, by stopping work, the dangerous condition could not be corrected, but would instead, result in nothing being accomplished. Likewise, the case law only holds the stevedore to have waived the shipowner's own breach by continuing with its stevedoring operations in those cases in which, by stopping the stevedoring operations, the breach of the shipowner could in fact have been corrected.

In the instant case the entire record fails to even hint of any action that could have been taken by any persons, including but not limited to the appellee, to correct the conditions resulting from the manner in which the shipowner had allowed its cargo to be stowed. The record is clear that the only course of conduct open to the stevedore company if it was in fact to perform its contract with the shipowner of discharging the vessel, was to continue with the discharge operations in the safest manner possible under the circumstances since, by stopping its operations, absolutely nothing could have been done to eliminate the risks involved. To reiterate, there is apparently no case, and appellant certainly cites no such case, which in any manner whatsoever indicates that a stevedore company has an obligation to stop work when by so stopping its operations an unsafe condition cannot be eliminated or corrected.

III.

The Law Clearly Places Definite Duties on the Shipowner to the Stevedore, Just as It Does on the Stevedore, and the Shipowner's Material Breach of His Own Duties to the Stevedore Precludes Indemnity.

A. The Shipowner's Own Breach of Contract.

Interestingly enough, throughout the shipowner's brief repeated reference is made to the stevedore company, the stevedore operations, and the conduct of the stevedore employees. Repeated efforts are made to focus attention upon the stevedore company and its operations. So effectively is this done that page after page of the brief goes by without any reference to the vessel, its officers, and its cargo of newsprint rolls stored atop the shaft alley, nor to the dangerous way in which the rolls had been stowed and the resulting unsafe conditions which confronted the stevedore company when the vessel came into port. The underlying theme of the shipowner's opening brief seems to be that since the longshoremen were attempting to discharge the cargo at the time of the accident, then, regardless of the fault of the shipowner itself, and regardless of the dangerous conditions created by the shipowner itself, that if there was in fact an accident, indemnity over against the stevedore company should be a matter of right. This theme of the shipowner is somewhat akin to the explanation of the gentleman who planted a land mine which exploded some days after he left it and, when called upon for an explanation, impliedly asserted that

even though he had placed the mine in the position it was in when it exploded, he had nonetheless been far removed from the scene for some time, and therefore, how could fault possibly be his?

Appellee urges that a fair reading of the transcript indicates without question the facts already referred to earlier in this brief to the effect that the vessel belonged to the appellant and that this vessel of the appellant, at the time it was turned over to the stevedore company, had the rolls of newsprint already stowed atop its shelves, inferentially at the direction of the shipowner's officers, in such a manner that, even to the plaintiff Bojorquez himself, the method being employed by the appellee at the time of the accident was apparently the safest method available to the stevedore company. The record further clearly indicates that the rolls had been stowed by the shipowner in a location aboard the vessel so that the customary method of a squeeze-clamp type of jitney could not be used to discharge them mechanically. Nor had they been stowed by the shipowner in such a location aboard the vessel that manual clamps of some type could have been used to discharge them. Nor had they been stowed by the shipowner in such a manner that space was available upon the shelves upon which the rolls themselves were stowed to allow men to knock the rolls over upon the shelves rather than having to pull them over into the pit between the shelves. To the contrary, the rolls were stowed by the shipowner in such a way that the only method available to the stevedore company to discharge the rolls

was the method which was in fact being used at the time of the accident. The true cause of the accident was that the location of the rolls, at the time the shipowner brought the ship in to be unloaded and up to the time of the accident, was such that the stevedore company was forced to employ the method of discharge it was in fact employing at the time of the plaintiff's injury. The evidence is that there was no other way for the job to be done.

A shipowner is charged with placing its vessel in such a condition as to permit a stevedoring company to be able to load or unload cargo with reasonable safety by the use of ordinary care (see *Hugev* (*supra*)), cited by appellant in its opening brief), and as the Supreme Court has pointed out when discussing the shipowner's own breach, in *Weyerhaeuser* (*supra*), a shipowner is entitled to indemnity when a stevedore company has rendered a substandard performance, *absent conduct on its (the shipowner's) part to preclude recovery.* (Italics and material in parentheses ours). The Supreme Court's language in *Weyerhaeuser* (*supra*) has been interpreted by the United States Court of Appeals for the Second Circuit in *Pettus v. Grace Line v. Sealand Dock & Terminal Co.*, 305 F.2d 151 (1962):

> "To be sure, since the claim for indemnity is based on the stevedoring contract, a material breach of that contract by Grace Line would preclude its enforcing the contract to recover indemnity."

That the United States Supreme Court and the United States Court of Appeals for the Second Circuit would so state is not at all surprising because the most elementary propositions of the law of contracts tell us that a party who attempts to recover damages for breach of contract must prove that he himself has complied with his obligations thereunder and if the party seeking recovery has not himself complied with the obligations under the contract, then, regardless of the fault of the other party to the contract, the party seeking recovery, because of his own breach, cannot recover.

That the position of the appellee as set forth in the preceding paragraph is in fact correct was in effect acknowledged by counsel for the appellant when no objection of any sort whatsoever was made by appellant's counsel to the court's instruction that "If the shipowner failed in a material respect to perform its said obligation, then regardless of whether or not the stevedoring company performed its said obligation, the verdict will be in favor of the stevedoring company and against the shipowner [Rep. Tr. p. 259, lines 14-18].

Although the *Weyerhauser* and *Pettus* (*supra*) cases as well as others speak in general terms of a shipowner being precluded from recovering indemnity because of the shipowner's own fault, there are few cases which have been called upon to apply these principles to specific factual situations although the general proposition finds iteslf repeated in many cases. However, just last year in the Second Circuit *Albanese v. N/V Nederl. Amerik. Stoom v. Maats*, 346 F.2d 481 (2nd Cir. 1965), reversed as to another point 382 U.S.

283, 1966 A.M.C. 557, was decided and stands in part for the proposition that:

> "Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job, merely concurrent fault is not enough."
>
> *Albanese* (*supra*) at 484.

Interestingly enough, there exists, at least to appellee's knowledge, no one case of any single court in the land *contra* to *Albanese* (*supra*). In view of *Albanese*, the court in the instant case instructed the jury that

> "If you should find that the vessel or its cargo was in such condition that the stevedore was prevented or seriously handicapped in its ability to discharge the vessel in a workmanlike manner and with reasonable safety then the shipowner is in fact precluded from recovering from the stevedore company." [Rep. Tr. p. 259, line 24, to p. 260. line 4].

The foregoing instruction correctly states the law as applied to the shipowner's own fault in indemnity actions such as this. This instruction, together with the several instructions which were given at the request of the shipowner's attorneys dealing with the law relating to breach of contract on the part of the stevedore company, constituted a fair and complete set of instructions dealing with the respective rights, duties and obligations running not only from the stevedore company to the shipowner but from the shipowner to the stevedore company as well.

IV.

The Trial Court Properly Denied the Shipowner's Motion for Directed Verdict and Judgment Notwithstanding the Verdict and Left the Determination of Questions of Fact to the Jury.

A. Such motions are considered most strongly in favor of the party against whom such motions are made. In ruling on motions for a new trial and motions for a directed verdict, the trial court views the evidence in the light most favorable to the party against whom the motion is made.

Mandro v. Vibbert (4th Cir. 1948), 170 F.2d 540;

Solomon v. United States (6th Cir. 1960), 276 F.2d 669, cert. den. (1960), 364 U.S. 890, 81 S.Ct. 219, 5 L.Ed. 2d 186, reh. den. (1961), 364 U.S. 939, 81 S.Ct. 376, 5 L.Ed. 2d 371;

Dun & Bradstreet, Inc. v. Nicklaus (8th Cir. 1965), 340 F.2d 882, cert. den. (1965), 86 S.Ct. 57.

On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.

Myers v. American Well Works (4th Cir. 1940), 114 F.2d 252, cert. den. (1941), 313 U.S. 563, 61 S.Ct. 842, 85 L.Ed. 1522;

O'Connor v. Pennsylvania R. Co. (2nd Cir. 1962), 308 F.2d 911.

In view of the extensive testimony already referred to in this brief dealing with (a) the stowage of cargo by the shipowner, (b) the lack of alternative methods of discharge available to the stevedore company, and (c) testimony that the cargo was already stowed in the manner described at the time it was turned over to the stevedore by the shipowner, the question of whether or not these facts were true and constituted a material breach of contract on the part of the shipowner itself was properly left to the jury. Interestingly enough, the shipowner endeavored to bring up the question of a possible stevedore company waiver of the shipowner's own breach at the time the motion for a judgment notwithstanding the verdict was made. Reference to the pleadings of the case, the entire court file, all of the evidence adduced at the time of trial, all of the instructions proposed by the shipowner, all of the instructions in fact given by the court, the single objection to instructions made by the shipowner and the arguments of the shipowner in support of his motion for a directed verdict indicates that at no time throughout the entire course of the trial was the question of whether or not the stevedore company waived the shipowner's own breach an issue in the case. Accordingly, it is inconceivable that this question, which, was at no time whatsoever made an issue in any form whatsoever by the shipowner could seriously and/or successfully be urged by the shipowner as a basis upon which to grant his motion for a judgment notwithstanding the verdict. Although the appellee takes the position that the question of whether or not the stevedore can waive the shipowner's own breach in a factual situation such as the instant case is in need of

judicial determination by this Circuit, the fact that this particular question was not even an issue in this case would seem to make such a determination unnecessary herein.

Conclusion.

Appellee wishes also to cite the *Italia* case (*Italia v. Oregon Stevedoring Co.*, 376 U.S. 315, 11 L.Ed. 2d 732, 84 S.Ct. 748 (1941)), and particularly calls the court's attention to that portion of the opinion cited by the shipowner to the effect that as between the shipowner and the stevedore company the party in the best position to prevent the longshoreman's accident will be made to bear the financial burden of his injuries. In the instant case the shipowner, either by stowing the rolls of newsprint, or by directing their stowage, in such a way that the stevedore company could discharge them, through the use of ordinary care, with reasonable safety, would, of course, have prevented the injury to the longshoreman. Instead of that, the shipowner, who had apparent complete and final control over the method in which the cargo was placed aboard the vessel as well as the location aboard the vessel where the cargo was in fact placed, nonetheless placed cargo in such a location that the stevedore company *could not* discharge the vessel with reasonable safety through the use of ordinary care. Certainly the stevedore company was not in the best position to prevent the longshoreman's accident because it was precluded from using customary methods of discharge by the way the shipowner had stowed the cargo. An argument that the stevedore should have ceased work is futile and impractical because nothing indicates that by ceasing work the dangerous condition could have been eliminated.

Had the stevedore, in fact, stopped its stevedore operations then, when operations were resumed, the same method of discharge would have been resumed since it was the only way there was to do the job. Since the shipowner could easily have prevented the accident by simply placing the rolls in a location in which the stevedore company could have used its customary method of discharging them, the shipowner was certainly the party in the best position to have prevented the accident. Significantly, the verdict herein indicates that this was the very conclusion of the jury.

Respectfully submitted,

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By JOHN SCOTT MATTHEW,
Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN SCOTT MATTHEW